

Claimant appealed the Award and alleges May 5, 2009, the date of her right elbow surgery, as the date of accident pursuant to K.S.A. 44-508(d) for this alleged series of

repetitive overuse injuries. On the issue of notice, claimant contends she provided sufficient and timely notice of injury as she notified her supervisors and management about her right elbow and back problems on several occasions and written claim was received by respondent on or before June 20, 2008.

Claimant argues she has proven her right arm and back injuries arose out of and in the course of her employment with respondent. In her brief to the Board claimant notes Judge Shelor failed to list as issues in the Award unpaid medical compensation and underpaid temporary total disability benefits. Finally, claimant asserts she is entitled to receive disability benefits for at least a 50 percent work disability.¹

Respondent requests the Board affirm the November 9, 2010, Award. Respondent asserts Judge Shelor correctly determined claimant failed to provide it with timely notice of an accidental injury. Respondent questions claimant's credibility and argues testimony from several witnesses and the record as a whole support the Judge's conclusion that claimant failed to provide timely notice. In its brief to the Board respondent concludes its arguments, in part, with the following:

The record is consistent that claimant did not at any point provide notice that her right elbow was hurting as a result of the work she performed for Fiber Dynamics. In fact, no notice of injury occurred. While respondent admits that claimant provided notice of a back injury, claimant was specifically questioned regarding whether the injury was a result of her employment. She was non committal to Mr. Manion and denied her condition was work related to Mr. Rodgers. . . . Even if it can be deemed that the employer had notice of the back injury, it cannot be said that they had any notice that it was related to her employment with Fiber Dynamic[s]. . . .²

The issues before the Board on this appeal are:

1. What is the date of accident?
2. Did claimant provide timely notice of the accidental injuries to respondent?
3. Did claimant's accidental injuries arise out of and in the course of her employment?
4. What is the nature and extent of claimant's injuries and disability?

¹ A permanent partial disability under K.S.A. 44-510e that is greater than the whole person functional impairment rating.

² Respondent's Brief at 11 (filed Jan. 12, 2011).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

The claimant has alleged in her Application for Hearing a repetitive series injury to her right elbow and back beginning November 20, 2006, up to and including January 14, 2008. Claimant worked in respondent's finishing department sanding aircraft panels with a power sander. Respondent does not dispute the repetitive nature of claimant's work activities. The Board finds claimant was injured through a series of microtraumas. Claimant's last day of work was January 7, 2008.

On January 14, 2008, claimant was terminated because some positions were eliminated.³ There is no dispute the claimant was not discharged because of her injury. The Special Administrative Law Judge did not specify a date he believed the accident occurred, but inferred the date of accident was January 7, 2008, when he listed "Did Claimant meet with personal injury by accident to her lower back and/or right elbow by repetitive overuse on or before January 7, 2008?"⁴ as one of the issues.

Before one can determine whether timely notice of the accident has been given, it is necessary to determine the date of accident. Where a claim involves an injury caused by a series of microtraumas or other repetitive work activities, K.S.A. 2008 Supp. 44-508(d) governs.

In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.⁵

³ P.H. Trans. at 52.

⁴ SALJ Award (Nov. 9, 2010) at 2.

⁵ K.S.A. 2008 Supp. 44-508(d).

The claimant contends the correct date of accident is May 5, 2009, the date on which her right elbow was operated by Dr. J. Mark Melhorn, who was the physician authorized pursuant to the January 23, 2009, Order of Administrative Law Judge Thomas Klein. That Order was affirmed by a member of this Board on March 26, 2009.⁶ The record indicates claimant was restricted by Dr. Melhorn the day of or the day after her May 5, 2009, surgery. An In Office Procedure Education Guides document from Dr. Melhorn's office dated April 28, 2009, which appears to be signed by claimant and an office staff witness, states in part: "You may return to light work the same day [of the procedure]."⁷ In a June 23, 2009, letter to claimant's attorney, Dr. Melhorn wrote in part: "Guadalupe Vasquez had surgery for the right elbow on May 5, 2009. Work status post surgery would be modified light work the day after surgery."⁸

There are several other potential accident dates for claimant's injuries. The first is January 7, 2008, the date claimant last worked. However, since this is a repetitive injury, K.S.A. 2008 Supp. 44-508(d) controls. The last date a claimant works is only the date of accident if the authorized physician takes the claimant off work due to the injury. Ms. Vasquez was not taken off work by an authorized physician on January 7, 2008, and, therefore, that date is not her accident date.

Another potential accident date is July 22, 2008, when claimant filed her Application for Hearing. However, subsequent to that date an authorized physician took claimant off work or restricted claimant from performing work which is the cause of claimant's condition. Under K.S.A. 2008 Supp. 44-508(d) this supersedes and takes precedence over the date the employee gives the employer written notice.

Another potential accident date is September 25, 2008, when claimant saw Dr. Pat D. Do for a court-ordered⁹ independent medical evaluation.¹⁰ Dr. Do is an authorized physician pursuant to K.S.A. 2008 Supp. 44-508(d). However, Dr. Do did not take claimant off work or give her any restrictions.

K.S.A. 2008 Supp. 44-508(d) notes that where an accident occurs as a result of a series of microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing

⁶ *Vasquez v. Fiber Dynamics, Inc.*, No. 1,041,161, 2009 WL 978947 (Kan. WCAB Mar. 26, 2009).

⁷ Melhorn Depo., Ex. 2.

⁸ *Id.*, Ex. 3.

⁹ Although Dr. Do's report reflects respondent's insurance carrier as the referral source, Judge Thomas Klein appointed Dr. Do to examine claimant's right elbow and lower back as a neutral physician in an August 12, 2008, Order.

¹⁰ Melhorn Depo., Ex. 2; Do Report (Sept. 25, 2008).

the work that caused the condition. Dr. Melhorn, on May 5, 2009, limited claimant to light work. Pursuant to K.S.A. 2008 Supp. 44-508(d), the Board finds claimant's date of accident is May 5, 2009.

The fact that the date of accident is over a year after the claimant was terminated by her employer was caused by the language of K.S.A. 2008 Supp. 44-508(d). In the recent case of *Saylor*,¹¹ the Kansas Court of Appeals addressed this very issue and determined that in 2005 the Kansas Legislature intended to change K.S.A. 44-508(d) as it existed prior to the 2005 amendment so the date of injury suffered through a series of microtraumas is no longer the last date the employee worked. Instead, the express language of that statute, which is plain and unambiguous, should be used to determine the date of accident.¹²

This Board finds that claimant's Application for Hearing filed on July 22, 2008, constitutes timely notice of claimant's injuries as required by K.S.A. 44-520. The Special Administrative Law Judge ruled timely notice of the accident was not given by the claimant and did not address the issues of whether claimant's injuries arose out of and in the course of her employment and the nature and extent of claimant's injuries and disability. Therefore, those issues are remanded to the Administrative Law Judge for further consideration and determination.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.¹³ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the November 9, 2010, Award entered by Special Administrative Law Judge Jerry Shelor is modified as to date of accident and reversed as to timely notice. The correct date of the claimant's accident is May 5, 2009. The claimant gave the employer timely notice of the accident. The issues of whether the claimant's injuries arose out of and in the course of her employment and the nature and extent of the claimant's injuries and disability are remanded to the Administrative Law Judge for determination.

IT IS SO ORDERED.

¹¹ *Saylor v. Westar Energy, Inc.*, 41 Kan. App. 2d 1042, 207 P.3d 275 (2009), *rev. granted* (May 18, 2010).

¹² *Id.*

¹³ K.S.A. 2010 Supp. 44-555c(k).

Dated this ____ day of March, 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Kelly W. Johnston, Attorney for Claimant
Timothy A. Emerson, Attorney for Respondent and its Insurance Carrier
Jerry Shelor, Special Administrative Law Judge
Thomas Klein, Administrative Law Judge